

**MIXED-MOTIVE JURY INSTRUCTIONS UNDER THE ADA  
AND ADAAA: ARE THEY STILL APPLICABLE IN THE WAKE  
OF *GROSS V. FBL FINANCIAL SERVICES, INC.* AND *UNIVERSITY  
OF TEXAS SOUTHWESTERN MEDICAL CENTER V. NASSAR*?**

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I. INTRODUCTION

Recently, courts reviewing claims under the Americans with Disabilities Act (ADA)<sup>1</sup> have had difficulty determining the appropriate standard of causation and requisite burden of proof for such claims.<sup>2</sup> Imagine the following scenario: An employee begins working at a nursing home as a registered nurse. After working for a year in that position, the employee develops a medical condition that causes her to have great difficulty walking and requires the occasional use of a wheelchair. The employee continues to discharge her duties as she had done before, albeit through the use of the wheelchair. In the meantime, her employer finds it inconvenient to have a disabled employee working at the facility, even though the employee continues to perform her job without incident. But the employer knows that the ADA prevents the firing of an employee based merely on the fact that she is disabled,<sup>3</sup> and thus, the employer is unable to fire her. As luck would have it for the employer though, on a single occasion, the employee has an outburst at work in which she yells at her supervisors. The employer takes that opportunity to fire the employee based both on the fact that she is disabled, as well as the fact that she had an outburst at work.

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<sup>1</sup> 42 U.S.C. § 12112 (2006). The term "ADA" in this Comment denotes the unamended version of the Americans with Disabilities Act. The term "ADAAA" (ADA Amendments Act) shall be used to refer to the current version of the ADA, which was amended in 2008.

<sup>2</sup> See, e.g., *Lewis v. Humboldt Acquisition Corp., Inc.*, 681 F.3d 312 (6th Cir. 2012).

<sup>3</sup> 42 U.S.C. § 12112 (2006).

What recourse, if any, is left to the employee at this point? As noted above, if the employer had fired the employee merely because the employee was disabled, then the employee would unquestionably be able to prevail under the ADA on a claim of unlawful employment discrimination.<sup>4</sup> The fact that the employer now has a legitimate reason to fire the employee due to her outburst, in conjunction with an impermissible consideration of her disability, complicates this issue. What should the employee have to prove in order to prevail on her ADA claim? Should she be required to prove “but-for causation” (i.e., that but-for her disability, she would not have been terminated)? Or should she be able to prevail if she can prove that her disability played any part of the employer’s decision to terminate her (i.e., a “mixed-motive” or “motivating factor” standard)? This question was recently answered by the Sixth Circuit on facts very similar to those in this hypothetical.<sup>5</sup>

In *Lewis v. Humboldt Acquisition Corp., Inc.*, a divided Sixth Circuit sitting *en banc* held in a 9-7 decision that a plaintiff alleging discrimination under Title I of the ADA must prove but-for causation.<sup>6</sup> The plaintiff was required to prove that, but-for her disability, she would not have been terminated.<sup>7</sup> This strict causal requirement has serious consequences on a plaintiff’s ability to prevail on an ADA claim. Returning to the original hypothetical (which was based generally on the facts of *Lewis*<sup>8</sup>), suppose that the employee was able to prove that her disability played some role in the employer’s decision to terminate her. Under a but-for causation standard, this fact alone would not be sufficient for the employee to prevail. The employee would also have to prove that, but-for this consideration, the employer would not have fired her. Put another way, the employee would have to prove that, if the employer had considered only legitimate factors such as her outburst, then the employer would not have fired her. But given the difficulty of proving but-for causation,<sup>9</sup> it is likely that the employee would be able to prove only that her disability played a role

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<sup>4</sup> See *id.* (“No covered entity shall discriminate against a qualified individual with a disability because of the disability of such . . .”).

<sup>5</sup> See *Lewis*, 681 F.3d 312.

<sup>6</sup> *Id.* at 321.

<sup>7</sup> *Id.*

<sup>8</sup> See *id.* at 313–14.

<sup>9</sup> See Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 861 n.8 (2012) (noting the difficulty that plaintiffs face in proving but-for causation when there are a mix of legitimate and illegitimate factors that motivate an adverse employment decision).

in the employer's decision—not that it was the “but-for” cause. Under the but-for causation standard enunciated in *Lewis*, the plaintiff would lose the case, notwithstanding the fact that she was able to prove that her employer considered a discriminatory criterion in its decision to fire her.

A rule that would require this result is wholly at odds with both the text and policies of the ADA. But the Supreme Court has recently expressed its reluctance to expand a mixed-motive/motivating factor framework beyond statutes that have such a provision explicitly providing for this framework in their text.<sup>10</sup> This Comment focuses on the struggle between the text, purpose, and legislative history of the ADA and these recent Supreme Court holdings. Moreover, this Comment demonstrates that, despite the Supreme Court's expressed attempts to narrow the scope of such a framework, the ADA calls for a mixed-motive/motivating factor standard of causation, where the employee has to prove only that her disability played a role in the employer's adverse decision. The literal language of the ADA, as well as its historical context and legislative history, compels this result.

Additionally, the new wording of the ADA under the ADA Amendments Act<sup>11</sup> (ADAAA) provides an even more compelling demonstration that but-for causation is not the appropriate standard for the burden of proof that a Title I ADA plaintiff must bear. In 2008, Congress amended the ADA through the ADAAA, effectively changing the causational language of the ADA from “because of” to “on the basis of.”<sup>12</sup> The “because of” language from the prior version of the ADA is still relevant for pending cases because the ADAAA is not retroactive.<sup>13</sup> But the new language dramatically affects the analysis of forthcoming cases in which the ADAAA controls.<sup>14</sup>

The remainder of this Comment provides background on the ADA and ADAAA and expands upon the arguments for why but-for causation is an inappropriate standard in these contexts. Part II provides a brief overview of the ADA and its historical underpinnings. It also delves further into the current controversy over the appropriate standard of causation and burdens of proof in an ADA case. Part III

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<sup>10</sup> See, e.g., *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009).

<sup>11</sup> 42 U.S.C. § 12112 (2006).

<sup>12</sup> See ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended at 42 U.S.C. §§ 12101–12213 (2009)).

<sup>13</sup> See, e.g., *Lewis*, 681 F.3d 312.

<sup>14</sup> See *infra* Part IV for a more detailed account of the interplay between the ADA and the ADAAA, as well as the continuing relevance of the “because of” language found in the ADA.

demonstrates that a plaintiff claiming discrimination under the ADA is entitled to the same mixed-motive standard that Title VII plaintiffs enjoy, notwithstanding the flawed reasoning of *Lewis* and the Supreme Court's attempts to narrow the scope of such a standard. Part IV discusses the effect that the ADAAA has on this analysis. That section argues that, based on the new causational language under the ADAAA as well as Congress's reasons for amending the ADA, there is an even more compelling argument for applying a mixed-motive standard to cases brought under the ADA as amended. Finally, Part V concludes that a mixed-motive standard of causation applies to both the ADA and the ADAAA.

## II. HISTORY OF THE ADA AND ITS LINK TO TITLE VII

Congress passed the ADA in 1990 to address discrimination against disabled individuals in different areas, including employment.<sup>15</sup> More specifically, the purposes of the ADA are to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."<sup>16</sup> The ADA was "[p]assed with overwhelming majorities in both houses of Congress . . . ."<sup>17</sup>

Title I of the ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."<sup>18</sup> In order to prevail on a claim of discrimination under Title I, a plaintiff must prove three things: (1) he has a "disability" as defined under the statute; (2) he is qualified for the position, or at least he would be qualified if his employer gave him a reasonable accommodation; and (3) his employer discriminated against him "because of" his disability.<sup>19</sup> This Comment focuses on the

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<sup>15</sup> 42 U.S.C. § 12101 (2006) (recognizing that "discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services").

<sup>16</sup> 42 U.S.C. § 12101(b)(1)–(2) (2006).

<sup>17</sup> Michael Selmi, *Interpreting the Americans with Disabilities Act: Why the Supreme Court Rewrote the Statute, and why Congress did not Care*, 76 GEO. WASH. L. REV. 522, 522 (2008).

<sup>18</sup> 42 U.S.C. § 12112 (2006).

<sup>19</sup> See 42 U.S.C. §§ 12111–12112 (2006); see also John L. Flynn, *Mixed-Motive*

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controversy surrounding the third of these elements.

*A. Early Jurisprudence Defining the “Because of” Phraseology*

In order to understand what the “because of” phrase means in the context of the ADA, it is prudent to first address how courts were interpreting this language in other contexts at the time that Congress passed the ADA. Prior to the enactment of the ADA, other employment discrimination statutes, such as Title VII and the Age Discrimination in Employment Act (ADEA), used the same “because of” phraseology.<sup>20</sup> The first major decision to interpret this language was *Price Waterhouse v. Hopkins*,<sup>21</sup> which addressed the meaning of “because of” in the context of a Title VII claim.

In *Price Waterhouse*, the Supreme Court established the applicable standard of causation and burden of proof in a Title VII discrimination case where there is a mix of legitimate and illegitimate factors that motivate an adverse employment decision.<sup>22</sup> Title VII states that it is unlawful for an employer to discriminate against an employee “because of such individual’s race, color, religion, sex, or national origin . . . .”<sup>23</sup> Justice Brennan, on behalf of a four Justice plurality, concluded that Congress intended Title VII to prevent employers from taking impermissible factors like sex into account when making employment decisions.<sup>24</sup> Based on this finding, Justice Brennan concluded that the words “because of” meant that the impermissible factor must be completely irrelevant to the making of an employment decision.<sup>25</sup> Put in practical application, under this holding, if an employer considers an impermissible factor like sex along with legitimate factors when making an employment decision, then the decision is said to be made “because of” the impermissible factor.<sup>26</sup> In essence, according to the plurality, a plaintiff in a Title VII case bears only the burden of establishing that his race, sex, or other protected trait was a motivating factor of an adverse employment decision. The

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*Causation Under the ADA: Linked Statutes, Fuzzy Thinking, and Clear Statements*, 83 GEO. L.J. 2009, 2013 (1995).

<sup>20</sup> 42 U.S.C. § 2000e-2(a)(1) (2006) (“It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . *because of* such individual’s race, color . . . .” (emphasis added)); 29 U.S.C. § 623(a)(1) (2006) (“It shall be unlawful for an employer to . . . discriminate against any individual . . . *because of* such individual’s age . . . .” (emphasis added)).

<sup>21</sup> 490 U.S. 228 (1989).

<sup>22</sup> *Id.* at 232.

<sup>23</sup> 42 U.S.C. §§ 2000e-2(a)(1), (2) (2012).

<sup>24</sup> *Price Waterhouse*, 490 U.S. at 239.

<sup>25</sup> *Id.* at 240.

<sup>26</sup> *Id.* at 241.

plaintiff does not have to prove that this factor was a but-for cause of the employment decision.<sup>27</sup>

Justice Brennan, however, also acknowledged that Congress did not mean to strip an employer of its freedom of choice when it enacted Title VII.<sup>28</sup> In order to ensure that employers could maintain some discretion in making their business decisions, Justice Brennan concluded that the statute granted an affirmative defense to employers by which they could avoid liability completely.<sup>29</sup> In order to prevail through this “same decision” affirmative defense, the employer would have to prove that it would have made the same adverse decision, even if it did not consider an impermissible factor such as race, sex, or another protected trait.<sup>30</sup> Thus, the typical Title VII mixed-motive case would proceed as follows: (1) Plaintiff must prove that the defendant employer made an adverse employment decision against him based, at least in part, on an impermissible factor such as race, sex, or another protected trait; (2) If the plaintiff makes such a showing, then the employer will be liable unless it can prove its affirmative defense; and (3) In order to establish the affirmative defense, the employer must bear the burden of persuasion that, even if the impermissible factor was not considered when making the adverse decision, the employer would still have made the same decision anyway based on other legitimate factors. Specifically, the employer must establish that the impermissible factor was not the but-for cause of the employment decision.<sup>31</sup>

In a separate concurring opinion, Justice O'Connor expressly disagreed with the plurality's holding that the phrase “because of” indicates a mixed-motive standard of causation.<sup>32</sup> According to Justice O'Connor, the phrase “because of” necessarily requires but-for causation.<sup>33</sup> For Justice O'Connor, the framework established by the plurality was the correct one, but she argued that it was best viewed as a burden-shifting framework in which the burden shifted from the plaintiff to the defendant to prove or disprove but-for causation, rather than a mixed-motive standard subject to an affirmative defense.<sup>34</sup> Justice O'Connor supported her conclusion through an analogy to

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<sup>27</sup> *Id.* at 241–42.

<sup>28</sup> *Id.* at 242.

<sup>29</sup> *Id.*

<sup>30</sup> *Price Waterhouse*, 490 U.S. at 244–45.

<sup>31</sup> *Id.* at 244–46.

<sup>32</sup> *Id.* at 262 (O'Connor, J., concurring).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 276 (O'Connor, J., concurring).

multiple causation cases in tort law, as well as the legislative history and policies of Title VII.<sup>35</sup> Accordingly, Justice O'Connor agreed with the plurality that the burden should be on the defendant to prove that the impermissible factor was not the but-for cause of the adverse employment decision.<sup>36</sup> But Justice O'Connor fundamentally disagreed that the phrase "because of" indicated a mixed-motive standard of causation.<sup>37</sup>

Finally, Justice Kennedy's dissenting opinion argued for yet another definition of the phrase "because of." According to Justice Kennedy, the phrase "because of" requires but-for causation, but the plaintiff bears the burden of proving it.<sup>38</sup>

Thus, there were three different interpretations of the phrase "because of" as related to Title VII.<sup>39</sup> But even though there was no general consensus as to the meaning of "because of," a majority of the Justices (the plurality plus Justice O'Connor and Justice White) agreed that, in a Title VII case, a plaintiff is not responsible for proving but-for causation.<sup>40</sup> He is only responsible for proving that a factor such as race, sex, or another protected trait was a motivating factor (or "substantial factor" as Justice White and Justice O'Connor originally phrased it) in the employer's adverse decision.<sup>41</sup> Upon this showing, the employer bears the burden of proving that the impermissible factor was not the but-for cause of the adverse decision.

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<sup>35</sup> *Id.* at 263–65 (O'Connor, J., concurring).

<sup>36</sup> *Price Waterhouse*, 490 U.S. at 275–76 (O'Connor, J., concurring).

<sup>37</sup> *Id.* at 275–76 (O'Connor, J., concurring). One other aspect of Justice O'Connor's concurrence also bears mentioning. According to Justice O'Connor, a plaintiff must use direct evidence to establish that his employer considered an impermissible factor in making an adverse employment decision. *Id.* at 276 (O'Connor, J., concurring). This aspect of Justice O'Connor's opinion, while relevant and significant in adjudicating ADA cases, is beyond the scope of this Comment.

<sup>38</sup> *Id.* at 281–83, 286 (Kennedy, J., dissenting).

<sup>39</sup> Justice White wrote a short concurring opinion as well in which he agreed with the framework established by the plurality based solely on analogous prior precedent. *Id.* at 258–60 (White, J., concurring). According to Justice White, there was no need to determine whether the framework should be categorized as a burden-shifting regime or a mixed-motive standard subject to an affirmative defense. *Id.* Prior precedent already clearly established that a plaintiff need only prove that an illegitimate factor was a "substantial" factor in an adverse employment decision. *Id.* Justice White disagreed with the plurality, however, with respect to the type of evidence that an employer must provide when asserting its "same decision defense," but this goes beyond the scope of this Comment. *Id.* at 261 (White, J., concurring).

<sup>40</sup> *Price Waterhouse*, 490 U.S. at 240–42; *id.* at 276 (O'Connor, J., concurring); *id.* at 258–60 (White, J., concurring).

<sup>41</sup> *Id.*

*B. The Civil Rights Act of 1991 and the Development of the Mixed-Motive Standard*

In response to *Price Waterhouse*, as well as some other Supreme Court cases decided around the same time, Congress enacted the Civil Rights Act of 1991 ("1991 CRA"), which amended several anti-discrimination statutes including Title VII, the ADA, and the ADEA.<sup>42</sup> Congress cited two reasons for enacting the 1991 CRA:

The first is to respond to recent Supreme Court decisions by restoring the civil rights protections that were dramatically limited by those decisions. The second is to strengthen existing protections and remedies available under federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination.<sup>43</sup>

While Congress approved of the expansion of victim protections in *Price Waterhouse*, Congress sought to expand victim protections even further by eliminating the opportunity of employers to escape liability through an affirmative defense.<sup>44</sup> Thus, in cases involving both legitimate and illegitimate factors that motivate an adverse employment decision, Congress amended Title VII to explicitly allow for a mixed-motive standard of causation.<sup>45</sup> This amendment codified the holding in *Price Waterhouse* that discriminating against an employee "because of" race, sex, or another protected trait meant that an employer would be liable for merely considering an impermissible factor among other legitimate factors when making an employment decision.<sup>46</sup> At the same time, however, this section removed the "same decision" affirmative defense established in *Price Waterhouse*, which was once available to employers.<sup>47</sup> This amendment, thus, marked the first legislative formulation of the "mixed-motive/motivating factor standard" in which a plaintiff would prevail on his claim if he could prove merely that his employer considered an impermissible factor in making an adverse employment decision.<sup>48</sup> But-for causation would be irrelevant to determining liability.<sup>49</sup>

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<sup>42</sup> Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

<sup>43</sup> H.R. REP. NO. 102-40, pt. 2, at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 694.

<sup>44</sup> H.R. REP. NO. 102-40, pt. 2, at 1, 4, 16-18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 694, 696-97, 709-11.

<sup>45</sup> *See* 42 U.S.C. § 2000e-2(m) (2006).

<sup>46</sup> *See id.*

<sup>47</sup> *See id.*

<sup>48</sup> *See id.*

<sup>49</sup> *See id.*



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Employers were, however, afforded some modicum of relief from this new plaintiff-friendly standard. While the 1991 CRA removed but-for causation from the liability inquiry, it made but-for causation relevant in the context of remedies.<sup>50</sup> Under § 2000e-5(g)(2)(B) of Title VII (as amended by the 1991 CRA), a plaintiff would be limited in the available relief for his claim if his employer could prove that it would have made the same decision without consideration of the impermissible factor (i.e., that the impermissible factor was not the but-for cause).<sup>51</sup> If an employer could make this showing, then the plaintiff would be entitled only to injunctive relief, declaratory relief, and attorney's fees and costs.<sup>52</sup>

This amendment left no room for doubt that but-for causation has no place in a Title VII liability inquiry. Standing alone, the *Price Waterhouse* decision and subsequent legislative action would be persuasive authority for extending this mixed-motive framework to the ADA, which is a similarly worded statute with similar goals—namely, the eradication of employment discrimination. As noted in the next section, however, Congress also linked the ADA to Title VII, further strengthening the argument that the mixed-motive framework established in Title VII applies to the ADA.

*C. The Creation of a Link Between the ADA and Title VII, and its Application in the Wake of Gross v. FBL Financial Services, Inc. and University of Texas Southwestern Medical Center v. Nassar*

When Congress enacted the ADA, it indicated that the ADA should be “interpreted in a manner consistent with . . . Title VII.”<sup>53</sup> Accordingly, Congress created the ADA as a “linked statute.”<sup>54</sup> It does not have its own enforcement provisions; rather, it shares the enforcement provisions of Title VII.<sup>55</sup> Under § 12117 of the ADA:

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of [Title VII] shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title,

<sup>50</sup> See 42 U.S.C. § 2000e-5(g)(2)(B) (2006).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> H.R. REP. NO. 102-40, pt. 2, at 4 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 697.

<sup>54</sup> See Flynn, *supra* note 19, at 2013.

<sup>55</sup> See *id.*

concerning employment.<sup>56</sup>

Thus, this section explicitly links the “powers, remedies, and procedures” of Title VII to the ADA.<sup>57</sup>

Moreover, Congress intended that any future amendments to those enforcement provisions of Title VII also apply to the ADA.<sup>58</sup> Accordingly, after the 1991 CRA amended Title VII to explicitly grant a full mixed-motive standard of causation, many of the circuit courts began to automatically apply a mixed-motive standard of causation to the ADA as well.<sup>59</sup> Courts, however, began to scrutinize this mixed-motive standard in ADA cases following the Supreme Court decision in *Gross v. FBL Financial Services, Inc.*<sup>60</sup>

While *Gross* dealt with a claim under the ADEA,<sup>61</sup> it has had far-reaching application in the context of the ADA as well.<sup>62</sup> In *Gross*, an employee sued his employer under the ADEA alleging that the employer demoted him because of his age.<sup>63</sup> It was uncontested that the Eighth Circuit precedent at that time applied the framework established in *Price Waterhouse* to ADEA cases where there was a mix of legitimate and illegitimate factors that motivated an adverse employment decision.<sup>64</sup> Under that standard, an ADEA plaintiff needed to prove only that age was a motivating factor in an

<sup>56</sup> 42 U.S.C. § 12117 (2006).

<sup>57</sup> *Id.*

<sup>58</sup> *Lewis v. Humboldt Acquisition Corp., Inc.*, 681 F.3d 312, 322 (6th Cir. 2012) (Clay, J., dissenting) (looking to an ADA House Report, which explicitly stated that future amendments to Title VII were to apply to the ADA as well); H.R. REP. NO. 102-40, pt. 2, at 4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 697 (“Certain sections of Title VII are explicitly cross-referenced in Subsection 107(a) of the ADA, to ensure that persons with disabilities have the same powers, remedies and procedures as under Title VII. This would include having the same remedies and statute of limitations as Title VII, as amended by this Act, *and by any future amendment.*”) (emphasis added); *see also* Flynn, *supra* note 19, at 2010 n.11 (“Congress links statutes instead of reproducing them, not because it is a paragon of efficiency or paper conservation, but because it wishes to ensure that future legislative changes to the original statute apply to the statute that references—or is linked to—it.”).

<sup>59</sup> *See, e.g., Head v. Glacier Nw. Inc.*, 413 F.3d 1053 (9th Cir. 2005); *Parker v. Columbia Pictures Indus.*, 204 F.3d 326 (2d Cir. 2000); *Foster v. Arthur Andersen, LLP*, 168 F.3d 1029 (7th Cir. 1999); *Newberry v. E. Texas State Univ.*, 161 F.3d 276 (5th Cir. 1998); *Katz v. City Metal Co., Inc.*, 87 F.3d 26 (1st Cir. 1996); *Pedigo v. P.A.M. Transp., Inc.*, 60 F.3d 1300 (8th Cir. 1995).

<sup>60</sup> 557 U.S. 167 (2009).

<sup>61</sup> *Id.* at 170.

<sup>62</sup> *See, e.g., Lewis*, 681 F.3d 312; *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir. 2010).

<sup>63</sup> *Gross*, 557 U.S. at 170.

<sup>64</sup> *Id.* at 171–72.

employment decision, and the employer would be liable unless it could prove its affirmative defense, demonstrating that age was not the but-for cause of the adverse decision. The sole question on certiorari was whether a plaintiff had to prove his case through direct evidence in order to be eligible for the *Price Waterhouse* framework.<sup>65</sup>

The Court, however, held that the *Price Waterhouse* framework was *never* available in an ADEA case.<sup>66</sup> More specifically, the Court found that the ADEA is materially different from Title VII, and that Title VII cases like *Price Waterhouse* do not control an analysis of the causation standards applicable to ADEA cases.<sup>67</sup> The Court stated that, “[w]hen conducting statutory interpretation, [it] ‘must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.’”<sup>68</sup> The Court also stated that, since its inception, the framework established in *Price Waterhouse* has been difficult to apply practically.<sup>69</sup> The Court did not overturn *Price Waterhouse*, but it did say that any possible benefit of extending the *Price Waterhouse* framework to ADEA cases was outweighed by its problems in application.<sup>70</sup>

For these reasons, the Court did not analyze the ADEA under the *Price Waterhouse* decision or similar Title VII cases. Instead, the Court looked at the plain text of the ADEA in rendering its decision.<sup>71</sup> First, the Court noted that the ADEA does not have an explicit mixed-motive provision like Title VII.<sup>72</sup> Moreover, the Court noted that both the ADEA and Title VII were amended under the 1991 CRA, yet Congress saw fit to add the mixed-motive provision only to Title VII.<sup>73</sup>

Ultimately, the Court consulted Webster’s dictionary and found that the causal language of the ADEA (“because of”) was equivalent to the phrase “by reason of.”<sup>74</sup> Under this definition, the Court found that an ADEA plaintiff must demonstrate that age was the “reason” for the adverse employment decision, which the Court held to mean but-for causation.<sup>75</sup>

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<sup>65</sup> *Id.* at 172.

<sup>66</sup> *Id.* at 169–70.

<sup>67</sup> *Id.* at 173.

<sup>68</sup> *Id.* at 174 (quoting *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008)).

<sup>69</sup> *Gross*, 557 U.S. at 179.

<sup>70</sup> *Id.* at 179–80.

<sup>71</sup> *Id.* at 175.

<sup>72</sup> *Id.* at 174.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 176.

<sup>75</sup> *Gross*, 557 U.S. at 176

Soon after the Court rendered its decision in *Gross*, the Seventh Circuit applied the *Gross* analysis to claims brought under the ADA.<sup>76</sup> As previously noted, the ADA uses the same “because of” language that is utilized in Title VII and in the ADEA, which the Court had analyzed in *Gross*.<sup>77</sup> In *Serwatka v. Rockwell Automation, Inc.*, the Seventh Circuit analogized the text of the ADA to that of the ADEA.<sup>78</sup> It interpreted the decision in *Gross* as holding that, unless there is express language in a statute allowing for a mixed-motive standard, the phrase “because of” in a statute means that the plaintiff must prove but-for causation.<sup>79</sup> The court concluded that, since the ADA had no explicit provision granting a mixed-motive standard, and since the ADA text used the phrase “because of,” a plaintiff bringing a claim under the ADA was not entitled to a mixed-motive standard.<sup>80</sup> Rather, a plaintiff suing under the ADA would be required to prove but-for causation.<sup>81</sup>

More recently, in *Lewis v. Humboldt Acquisition Corp., Inc.*, the Sixth Circuit had the opportunity to address this issue.<sup>82</sup> In *Lewis*, as in *Serwatka*, the court held that an ADA plaintiff must prove but-for causation rather than merely satisfy a mixed-motive standard of causation.<sup>83</sup> The court began by recapping the history of Title VII, including the *Price Waterhouse* decision and the 1991 CRA.<sup>84</sup> The court concluded that the Title VII history could be viewed in one of two ways. The first way is that the *Price Waterhouse* decision was intended to govern the meaning of “because of” in *all* statutes with similar wording.<sup>85</sup> The second way is that, by explicitly amending Title VII to grant a mixed-motive standard without doing the same to other similarly worded laws, Congress intended for the mixed-motive standard to apply only to Title VII.<sup>86</sup> According to the majority, Congress clearly adopted the latter interpretation.<sup>87</sup>

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<sup>76</sup> See *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir. 2010).

<sup>77</sup> See 42 U.S.C. § 12112 (2006) (“No covered entity shall discriminate against a qualified individual with a disability *because of* the disability of such individual . . . .”) (emphasis added).

<sup>78</sup> *Serwatka*, 591 F.3d at 961–62.

<sup>79</sup> *Id.* at 962.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> 681 F.3d 312 (6th Cir. 2012).

<sup>83</sup> *Id.* at 317–18.

<sup>84</sup> *Id.* at 317.

<sup>85</sup> *Id.* at 318.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

The majority then analogized the ADA to the ADEA.<sup>88</sup> The court noted that neither the ADA nor the ADEA has explicit wording granting a mixed-motive standard even though the 1991 CRA amended both statutes at the same time that it added the mixed-motive language to Title VII.<sup>89</sup> Moreover, both statutes use the words “because of” as their standard of causation.<sup>90</sup> The court also rejected arguments based on legislative history and legislative intent, holding that such appeals were ineffective in *Gross* and were ineffective here as well.<sup>91</sup>

Finally, the court rejected an argument that the shared powers, remedies, and procedures of Title VII and the ADA through the statutory link entitled ADA plaintiffs to a mixed-motive standard.<sup>92</sup> Ultimately then, the majority found the ADA context indistinguishable from the ADEA, which was analyzed in *Gross*. For many of the same reasons advanced in *Gross*, the court found that ADA plaintiffs are not entitled to a mixed-motive standard, and must instead prove but-for causation.<sup>93</sup>

In separate dissenting opinions, Judges Clay, Stranch, and Donald expressed their disapproval of the holding reached by the majority, and explained why the language of the ADA actually supports a motivating factor standard of causation rather than a but-for causation standard.<sup>94</sup> Judge Clay and Judge Donald argued that the statutory link between the ADA and Title VII was dispositive on the issue.<sup>95</sup> Since the link incorporates the “powers, remedies, and procedures” of Title VII into the ADA, the dissenters argued that the motivating factor standard of Title VII applies to the ADA as well.<sup>96</sup> Moreover, Judge Stranch and Judge Donald put great emphasis on the historical context of the ADA, beginning with *Price Waterhouse* and concluding with the codification of the meaning of the phrase “because of” through the 1991 CRA and the subsequent implementation of the ADA.<sup>97</sup> The historical context demonstrated that, at the time of the enactment of the ADA, the phrase “because of” was being interpreted as granting a motivating

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<sup>88</sup> *Lewis*, 681 F.3d at 318.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 320.

<sup>92</sup> *Id.* at 319–20.

<sup>93</sup> *Id.* at 321.

<sup>94</sup> See *Lewis*, 681 F.3d at 322–25 (Clay, J., dissenting); *id.* at 325–31 (Stranch, J., dissenting); *id.* at 331–42 (Donald, J., dissenting).

<sup>95</sup> See *id.* at 322–23 (Clay, J., dissenting); *id.* at 340–41 (Donald, J., dissenting).

<sup>96</sup> *Id.*

<sup>97</sup> See *id.* at 326–27 (Stranch, J., dissenting); *id.* at 332–33 (Donald, J., dissenting).

factor standard of causation.<sup>98</sup> Judge Stranch also relied on legislative history, including House Reports, for the assertion that Congress intended to grant ADA plaintiffs a motivating factor standard of causation.<sup>99</sup>

While cases like *Serwotka* and *Lewis* serve to demonstrate the struggle that courts have faced in determining the scope of the mixed-motive framework in the wake of *Gross*, the Supreme Court recently complicated the issue further with its decision in *University of Texas Southwestern Medical Center v. Nassar*.<sup>100</sup> In *Nassar*, a Middle Eastern medical doctor sued his employer pursuant to Title VII for status-based discrimination<sup>101</sup> based on his race and religion in violation of 42 U.S.C. § 2000e-2(a) (2006), and for retaliation after he complained about the status-based discrimination in violation of 42 U.S.C. § 2000e-3(a) (2006).<sup>102</sup> The question on certiorari was whether the mixed-motive framework that applies to Title VII status-based discrimination claims under § 2000e-2(a) also applies to Title VII retaliation claims under § 2000e-3(a).<sup>103</sup> Writing for a five Justice majority, Justice Kennedy held that, while Title VII status-based discrimination claims under § 2000e-2(a) were governed by the mixed-motive framework of §§ 2000e-2(m), 2000e-5(g) (2) (B), Title VII retaliation claims brought pursuant to § 2000e-3(a) were governed by the stricter but-for causation standard.<sup>104</sup>

Notwithstanding the fact that Title VII's enforcement and remedies section, § 2000e-5, applies to both status-based discrimination and retaliation,<sup>105</sup> the Court found that the specific subsection of § 2000e-5 that provides for the enforcement of the mixed-motive framework, § 2000e-5(g) (2) (B), applied only to Title VII status-based discrimination claims.<sup>106</sup> In so holding, the Court began by looking at the language and structure of Title VII. As the Court

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<sup>98</sup> See *Lewis*, 681 F.3d at 326–27 (Stranch, J., dissenting); *id.* at 332–33 (Donald, J., dissenting).

<sup>99</sup> *Id.* at 329–31 (Stranch, J., dissenting). See discussion *infra* Part III for a deeper analysis of the dissenting opinions in *Lewis* as well as an expansion of their arguments.

<sup>100</sup> 133 S. Ct. 2517 (2013).

<sup>101</sup> The phrase “status-based discrimination” is used in this Comment to denote discrimination by an employer based on an employee’s *status* as an individual, such as race, sex, age, disability, or other protected traits. This is separate and apart from discrimination based on an employee’s protected *conduct* in the context of retaliation.

<sup>102</sup> *Nassar*, 133 S. Ct. at 2523–24.

<sup>103</sup> *Id.* at 2523.

<sup>104</sup> *Id.* at 2533.

<sup>105</sup> See 42 U.S.C. § 2000e-5 (2012).

<sup>106</sup> See *Nassar*, 133 S. Ct. at 2533.

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noted, when Congress drafted Title VII, it did not place unlawful retaliation under § 2000e-2 along with unlawful status-based discrimination, but rather in a different subsection, § 2000e-3.<sup>107</sup> The Court, thus, analyzed the text of the retaliation subsection separate from the text of the status-based discrimination section. After examining the plain language of § 2000e-3, the Court found that, since Title VII's retaliation provision prohibits discriminatory conduct "because" an employee has engaged in some protected activity, there was no "meaningful textual difference" between Title VII's retaliation provision and the ADEA's status-based discrimination provision analyzed in *Gross*.<sup>108</sup> As such, the Court found that *Gross* controlled the analysis, and the word "because" in the Title VII retaliation context signified a but-for causation standard, as it did under the ADEA.<sup>109</sup>

Moreover, the Court rejected Plaintiff's arguments that the mixed-motive provision of § 2000e-2(m) applied to all Title VII "unlawful employment practices," including retaliation.<sup>110</sup> Looking to the plain text of § 2000e-2(m), the Court noted that, "while it begins by referring to 'unlawful employment practices,'" it specifically delineates certain types of "unlawful employment practices" that are subject to the mixed-motive framework—namely "actions based on the employee's status."<sup>111</sup> Since retaliation is not an unlawful practice "based on the employee's status," the Court found that the plain language of § 2000e-2(m) did not apply to retaliation.<sup>112</sup> Rejecting Plaintiff's argument that retaliation is status-based discrimination under current jurisprudence,<sup>113</sup> the Court looked to the statutory structure of Title VII to support its holding that the way in which Congress drafted Title VII ruled out the possibility that retaliation was simply "an implicit corollary of status-based discrimination."<sup>114</sup>

The Court then went on to cite specific policy concerns that would be implicated if the Court were to expand the mixed-motive framework beyond cases of status-based discrimination to include claims of retaliation. Notably, the Court stated its concern that expanding the mixed-motive framework to retaliation claims could lead to an increase in frivolous litigation.<sup>115</sup> As the Court noted, unlike

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<sup>107</sup> *Id.* at 2528.

<sup>108</sup> *Id.*

<sup>109</sup> *See id.*

<sup>110</sup> *See id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Nassar*, 133 S. Ct. at 2528.

<sup>113</sup> *See id.*

<sup>114</sup> *Id.* at 2530.

<sup>115</sup> *Id.* at 2531–32.

status-based discrimination, which is based upon certain *characteristics* of an employee, retaliation protects against an employee's protected *activity*.<sup>116</sup> Thus, in the retaliation context, an employee could prevent an employer from engaging in *lawful* activity simply by making a false complaint of status-based discrimination.<sup>117</sup> For example, an employee who is performing poorly may attempt to forestall an employer from firing him by making a false charge of status-based discrimination. The employer may then hesitate to take any lawful action against the employee for fear of being sued for retaliation under a plaintiff-friendly causation standard.<sup>118</sup>

Lastly, the Court rejected Plaintiff's argument that deference should be given to the Equal Employment Opportunity Commission's (E.E.O.C.) determination that Title VII retaliation cases are governed by a mixed-motive standard.<sup>119</sup> According to the Court, the E.E.O.C.'s justifications for its determination "lack the persuasive force that is a necessary precondition to [granting] deference . . . ."<sup>120</sup> Thus, the Court ultimately concluded that a plaintiff suing for retaliation under Title VII bears the burden of proving but-for causation.<sup>121</sup>

### III. PLAINTIFFS BRINGING A CLAIM UNDER THE ADA ARE ENTITLED TO THE SAME MIXED-MOTIVE INSTRUCTION AND REMEDIES AS TITLE VII PLAINTIFFS

The arguments advanced by the majority in *Lewis* and *Serwatka* are fatally flawed. Both cases looked to the express language in the ADA that resembled that of the ADEA without giving sufficient attention to the historical differences between the two statutes. When put in the appropriate historical context, both the language and legislative history of the ADA demonstrate that the phrase "because of" as applied to the ADA was intended to grant ADA plaintiffs the ability to assert a claim under a mixed-motive standard of causation. Moreover, while the Supreme Court has expressly sought to limit the scope of the mixed-motive framework—refusing to expand the framework to Title VII retaliation cases<sup>122</sup>—the historical context and language of the ADA

<sup>116</sup> See *id.* (discussing concerns specific to retaliation cases where the employee's protected *activity* prevents an employer from taking lawful action).

<sup>117</sup> See *id.*

<sup>118</sup> See *Nassar*, 133 S. Ct. at 2532.

<sup>119</sup> See *id.* at 2533–34.

<sup>120</sup> *Id.* at 2533.

<sup>121</sup> *Id.* at 2534.

<sup>122</sup> See *id.*



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demonstrate that the ADA is sufficiently distinguishable from the Title VII retaliation context as to provide for a mixed-motive standard.

*A. The Statutory Link Between the ADA and Title VII Expressly Grants ADA Plaintiffs the Same Mixed-Motive Standard of Causation as Title VII Plaintiffs*

As noted above, Congress linked the enforcement provisions of the ADA to those of Title VII through § 12117.<sup>123</sup> Under this section, the ADA is to have the same “powers, remedies, and procedures” that are listed in §§ 2000e-4, -5, -6, -8, and -9 of Title VII.<sup>124</sup> The plain language of § 12117 indicates that any amendments made to the “powers, remedies, and procedures” of Title VII will apply to the ADA as well.<sup>125</sup>

One such amendment was made to Title VII § 2000e-5 under the 1991 CRA in response to the decision in *Price Waterhouse*.<sup>126</sup> This section states that:

On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

- (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney’s fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
- (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).<sup>127</sup>

<sup>123</sup> 42 U.S.C. § 12117 (2006).

<sup>124</sup> *Id.*

<sup>125</sup> As discussed *supra* Part II.C., § 12117 states that “[t]he powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of [Title VII] shall be the powers, remedies, and procedures [of the ADA].” 42 U.S.C. § 12117 (2006) (emphasis added). Since the amended versions of those enumerated sections contain “powers, remedies, and procedures set forth in [those] sections,” they will accordingly apply to the ADA. *See* 42 U.S.C. §§ 2000e-4, -5, -6, -8, -9 (2006); 42 U.S.C. § 12117 (2006). Moreover, even if there is any ambiguity in the language of § 12117 with regard to whether or not it applies to amendments to Title VII, the legislative history of that section clearly demonstrates that Congress intended for such amendments to apply to the ADA. *See* *Lewis v. Humboldt Acquisition Corp., Inc.*, 681 F.3d 312, 322 (6th Cir. 2012) (Clay, J., dissenting); H.R. REP. NO. 102-40, pt. 2, at 4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 697; *see also* Flynn, *supra* note 19, at 2010 n.11.

<sup>126</sup> 42 U.S.C. § 2000e-5(g)(2)(B) (2006).

<sup>127</sup> *Id.*

This section is one of two essential amendments made to Title VII through the 1991 CRA. First, § 2000e-2(m) establishes liability under the newly codified mixed-motive standard.<sup>128</sup> Second, § 2000e-5(g)(2)(B) limits the remedies available to the plaintiff upon establishing liability, if the employer is able to prove that the plaintiff's protected status was not the but-for cause of the employer's adverse decision.<sup>129</sup> Since amendments to Title VII's enforcement provisions apply to the ADA as well,<sup>130</sup> it is beyond debate that the newly amended § 2000e-5 would apply to the ADA. The problem, however, is that the section establishing liability (§ 2000e-2(m)) is not one of the enforcement provisions that expressly applies to the ADA through the statutory link.<sup>131</sup> Essentially, the statutory language seems to create a remedy for the ADA<sup>132</sup> with no express method for establishing the requisite liability for obtaining that remedy. The question, then, is whether an ADA plaintiff is entitled to the Title VII mixed-motive framework under § 2000e-2(m) through incorporation by § 2000e-5(g)(2)(B), notwithstanding the fact that § 2000e-2(m) itself is not expressly incorporated into the ADA.

Under any sensible reading of these statutes,<sup>133</sup> § 2000e-2(m), the mixed-motive liability section of Title VII, must be incorporated into the ADA. While § 2000e-2(m) is not directly incorporated into the ADA through the enforcement provisions link, it is still incorporated into the ADA through § 2000e-5(g)(2)(B). A reference to § 2000e-2(m) is explicitly made in § 2000e-5(g)(2)(B).<sup>134</sup> A plaintiff will be entitled to the 2000e-5(g)(2)(B) remedies upon a demonstration that 2000e-2(m) has been violated, and upon the employer's showing that there was no but-for causation.<sup>135</sup> There is essentially a double link here: § 2000e-5(g)(2)(B) is linked to the ADA through the

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<sup>128</sup> See 42 U.S.C. § 2000e-2(m) (2006) (“[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice.”) (emphasis added).

<sup>129</sup> 42 U.S.C. § 2000e-5(g)(2)(B) (2006).

<sup>130</sup> See *supra* note 125 and accompanying text.

<sup>131</sup> See 42 U.S.C. § 12117 (2006).

<sup>132</sup> 42 U.S.C. § 2000e-5(g)(2)(B) (2006).

<sup>133</sup> 42 U.S.C. § 12117 (2006); 42 U.S.C. § 2000e-5(g)(2)(B) (2006); 42 U.S.C. § 2000e-2(m) (2006).

<sup>134</sup> See 42 U.S.C. § 2000e-5(g)(2)(B) (2006) (“On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor. . .”).

<sup>135</sup> *Id.*

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enforcement provision of ADA § 12117. That section then references § 2000e-2(m), thereby incorporating those standards into the ADA. The most logical reading of these provisions is that § 2000e-5(g)(2)(B), which is explicitly linked to the ADA, grants an ADA plaintiff limited relief upon a showing that an impermissible factor (i.e., disability) played a role in an adverse employment decision, and after the employer proves that the impermissible factor was not the but-for cause of the decision.

Some courts have unconvincingly argued against this enforcement link-based interpretation of the interplay between the Title VII mixed-motive provisions and the ADA.<sup>136</sup> One such argument was advanced by the Seventh Circuit in *Serwatka*,<sup>137</sup> which noted that the statutory link between Title VII and the ADA links only powers, remedies, and procedures.<sup>138</sup> According to the court, § 2000e-2(m) is not a power, remedy, or procedure; rather, it is a standard of liability, which is not a provision of Title VII that is linked to the ADA under § 12117.<sup>139</sup> Accordingly, the court held that § 2000e-2(m) was inapplicable to the ADA, and that plaintiffs suing under the ADA were, therefore, not entitled to a mixed-motive standard.<sup>140</sup>

While it is true that § 12117 links only “powers, remedies, and procedures,” the argument raised by *Serwatka* is untenable because it fails to recognize that a remedy without a mechanism for producing liability would be meaningless. If § 2000e-2(m) was not intended to apply to the ADA, then there would have been no need to link the ADA to the remedy established under § 2000e-5(g)(2)(B) with no means of obtaining the remedy provided therein. As the Supreme Court has repeatedly held, cannons of statutory interpretation require that a provision of a statute be read in a manner that does not render other provisions of that statute superfluous.<sup>141</sup>

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<sup>136</sup> See, e.g., *Lewis v. Humboldt Acquisition Corp., Inc.*, 681 F.3d 312, 319–20 (6th Cir. 2012); *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 962 (7th Cir. 2010).

<sup>137</sup> See *supra* Part II.C.

<sup>138</sup> *Serwatka*, 591 F.3d at 962.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> See, e.g., *Bilski v. Kappos*, 130 S. Ct. 3218, 3228 (2010) (recognizing a “canon against interpreting any statutory provision in a manner that would render another provision superfluous”); *Hibbs v. Winn*, 542 U.S. 88, 89 (2004) (“[T]he rule against superfluities instructs courts to interpret a statute to effectuate all its provisions, so that no part is rendered superfluous.”); *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476–77 (2003) (“Absent a statutory text or structure that requires us to depart from normal rules of construction, we should not construe [a] statute in a manner that is strained and, at the same time, would render a statutory term superfluous.”).

Furthermore, one may characterize the mixed-motive framework established in part through § 2000e-5(g)(2)(B) as a “power”<sup>142</sup> or “procedure.” Webster’s dictionary defines the term “power” as the “ability to act or produce an effect.”<sup>143</sup> Section 2000e-5(g)(2)(B) gives an ADA plaintiff the “ability to produce [the] effect” of obtaining specific remedies by demonstrating that his employer considered the plaintiff’s disability in making an adverse employment decision.<sup>144</sup> Similarly, Webster’s dictionary defines the term “procedure” as “a particular way of accomplishing something.”<sup>145</sup> Section 2000e-5(g)(2)(B) provides an ADA plaintiff with a “particular way of accomplishing something”—i.e. a particular way of obtaining the specific remedies delineated therein, by demonstrating that the employer considered the plaintiff’s disability in making an employment decision. This analysis indicates that the mixed-motive standard applies to the ADA.

“But wait,” one might say in light of the Supreme Court’s recent decision in *Nassar*. Section 2000e-5 applies to Title VII retaliation just as it does to the ADA; yet the Supreme Court held that § 2000e-5(g)(2)(B) does *not* apply to Title VII retaliation.<sup>146</sup> Why then should claims under the ADA be entitled to the remedy provided by § 2000e-5(g)(2)(B) when Title VII retaliation claims are not?” The answer, of course, is that, while the remedies of § 2000e-5 are applicable to Title VII claims generally,<sup>147</sup> Congress explicitly linked not only the remedies, but also the powers and procedures of § 2000e-5 to the ADA.<sup>148</sup> Thus, not only is the ADA linked to the remedies of § 2000e-5 generally—as is the case with Title VII retaliation claims—but it is also explicitly linked to the powers and procedures applicable under that section, including § 2000e-5(g)(2)(B).<sup>149</sup> Perhaps even more significantly, Title I of the ADA is distinguishable from Title VII retaliation in that it prohibits status-based discrimination rather than

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<sup>142</sup> Seam Park, *Curing Causation: Justifying a “Motivating-Factor” Standard Under the ADA*, 32 FLA. ST. U. L. REV. 257, 273 (2004).

<sup>143</sup> Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/power> (last visited Jan. 26, 2014).

<sup>144</sup> See Park, *supra* note 142, at 273.

<sup>145</sup> Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/procedure> (last visited Jan. 26, 2014).

<sup>146</sup> See *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013).

<sup>147</sup> 42 U.S.C. § 2000e-5 (2006).

<sup>148</sup> See 42 U.S.C. § 12117(a) (2006).

<sup>149</sup> See *id.*

retaliatory activity.<sup>150</sup> In fact, the Court in *Nassar* explicitly based its holding on this very distinction.<sup>151</sup> Thus, the Court's discussion of the application of both § 2000e-2(m) and § 2000e-5(g)(2)(B) to Title VII retaliation cases is simply inapposite in the Title I ADA context.<sup>152</sup>

Another argument that has been raised in opposition to the conclusion that § 2000e-2(m) is incorporated into the ADA is that, in order to get a remedy under § 2000e-5(g)(2)(B), by its terms, a plaintiff must first establish a violation of § 2000e-2(m).<sup>153</sup> This would (as the argument suggests) include proving that "*race, color, religion, sex, or national origin* was a motivating factor for any employment practice . . . ."<sup>154</sup> Thus, if an ADA plaintiff wanted to obtain a mixed-motive standard under the ADA, he would have to prove discrimination based on Title VII factors such as race, sex, etc., rather than on disability.

As with the first proposed argument mentioned above, this argument fails because it would render Title I of the ADA a nullity. As previously noted, the ADA does not have its own remedies or enforcement procedures and must rely instead on those provided by Title VII.<sup>155</sup> If those remedies could be obtained only by proving discrimination based on race, sex, etc., then no plaintiff would ever be able to sue for discrimination based on a disability. The only logical reading of the statutory link between the ADA and Title VII is that an ADA plaintiff may enforce the provisions of the ADA for *disability* discrimination in the same manner that a Title VII plaintiff could enforce the provisions of Title VII for discrimination based on race, sex, etc. Accordingly, an ADA plaintiff may enforce the laws prohibiting discrimination based on disability through the same mixed-motive mechanism that Title VII plaintiffs use to establish status-

<sup>150</sup> See 42 U.S.C. § 12112 (2006).

<sup>151</sup> See *Nassar*, 133 S. Ct. at 2525, 2528, 2531–32.

<sup>152</sup> It bears noting that ADA retaliation cases may be similarly distinguishable from the Title VII retaliation context. As with ADA status-based discrimination claims, ADA retaliation claims based on an employee's opposition to Title I status-based discrimination are also linked to the "powers, remedies, and procedures" of Title VII. See 42 U.S.C. §§ 12117, 12203 (2006). This distinguishes ADA retaliation from Title VII retaliation, which is linked only to the remedies of § 2000e-5 generally. See *supra* notes 146–48 and accompanying text. But it is unlikely that the Supreme Court would extend the mixed-motive framework to ADA retaliation cases as it has expressed its concern that allowing a lower burden of proof for plaintiffs in retaliation cases may lead to frivolous litigation and extortion by many would-be plaintiffs. See *Nassar*, 133 S. Ct. at 2531–32.

<sup>153</sup> *Lewis v. Humboldt Acquisition Corp., Inc.*, 681 F.3d 312, 319–20 (6th Cir. 2012).

<sup>154</sup> 42 U.S.C. § 2000e-2(m) (2006) (emphasis added).

<sup>155</sup> See 42 U.S.C. § 12117(a) (2006).

based discrimination based on race, sex, and other protected traits.<sup>156</sup>

*B. The Historical Context of the ADA Also Suggests that the Phrase  
“Because of” in the ADA Requires a Mixed-Motive Standard*

Aside from the explicit statutory link granting an ADA plaintiff the same mixed-motive standard as a Title VII plaintiff, the phrase “because of” as applied to the ADA also suggests a mixed-motive standard of causation. The historical context behind the ADA holds the key to determining what Congress intended the phrase “because of” to mean with regard to the ADA. As a preliminary matter, it should be noted that a blanket application of *Gross*’s holding that “because of” means but-for causation would be wholly inappropriate. In *Gross*, the Court sought to define the phrase “because of” with regard to the ADEA. The Court ended up consulting the dictionary, and ultimately concluded that the phrase “because of” in the ADEA required a finding of but-for causation.<sup>157</sup>

This holding, however, should not be read to be a blanket assertion that “because of” always means but-for causation. First, as the Court itself notes, “[w]hen conducting statutory interpretation, we ‘must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.’”<sup>158</sup> *Gross* was a decision based on an ADEA case, not an ADA case. A strict application of the holding in *Gross* to a claim under the ADA would, thus, be contradictory to the Court’s assertion that different statutes should be analyzed separately. Second, the phrase “because of” cannot always mean but-for causation because Title VII still uses the words “because of”<sup>159</sup> as its causal language for status-based discrimination cases, yet those cases are analyzed under a mixed-motive standard based on the amended provisions that were added to Title VII.<sup>160</sup> If *Gross* is read as holding that “because of” *always* means but-for causation, then Title VII would have conflicting causation standards. A more logical reading of *Gross* is that the Court only

<sup>156</sup> See, e.g., *Lewis*, 681 F.3d at 340–41 (Donald, J., dissenting) (noting that by linking § 2000e-5(g)(2)(B) to the ADA, Congress intended for those remedies to be available to ADA plaintiffs, and the remedies only apply in the mixed-motive context).

<sup>157</sup> *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009).

<sup>158</sup> *Id.* at 174 (quoting *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008)).

<sup>159</sup> 42 U.S.C. § 2000e-2(a)(1) (2006) (“It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual’s race, color . . .”) (emphasis added).

<sup>160</sup> See 42 U.S.C. § 2000e-2(m) (2006).

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determined that “because of” means but-for causation in the ADEA context.

Since the holding of *Gross* was, thus, limited to the ADEA, a closer look at the ADA is required in order to determine the meaning of the phrase “because of” as applied to the ADA. In the ADA context, this phrase should be viewed similarly to Title VII based on the history surrounding the enactment of the ADA, beginning with *Price Waterhouse*. As noted above, the Court in *Price Waterhouse* interpreted the phrase “because of” in Title VII as allowing a plaintiff to prevail on his Title VII claim if he could prove simply that his employer’s adverse action was based, at least in part, on impermissible factors such as race, sex, or another protected trait.<sup>161</sup> The employer would then be given the opportunity to avoid liability by establishing a “same decision” affirmative defense.<sup>162</sup> Congress then codified this holding in Title VII while stripping the employer of any affirmative defense, thus, effectively establishing a complete mixed-motive standard.<sup>163</sup> Before codifying this holding, however, Congress enacted the ADA with the same “because of” language,<sup>164</sup> and linked the enforcement provisions of Title VII to it.<sup>165</sup> After linking the statutes, Congress then amended Title VII to explicitly include the new motivating factor standard,<sup>166</sup> yet it did not change the “because of” language that was present in the text of Title VII.<sup>167</sup>

Piecing all of this together, it appears that Congress intentionally kept the phrase “because of” in Title VII along with the mixed-motive standard to convey that it intended the phrase “because of” to mean that a plaintiff would be entitled to a mixed-motive standard. Several of these historical facts lead to the conclusion that Congress intended for the “because of” language in the ADA to have the same mixed-motive application as it does in Title VII: The ADA was adopted in very close proximity to both *Price Waterhouse* and the 1991 CRA;<sup>168</sup> Congress linked Title VII and the ADA together to ensure that the 1991 CRA amendments would apply to the ADA;<sup>169</sup> and Congress kept the

<sup>161</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240–41 (1989).

<sup>162</sup> *See id.* at 244–45.

<sup>163</sup> *See* 42 U.S.C. § 2000e-2(m) (2006); 42 U.S.C. § 2000e-5(g)(2)(B) (2006).

<sup>164</sup> *See* 42 U.S.C. § 12112(a) (2006).

<sup>165</sup> *See* 42 U.S.C. § 12117 (2006).

<sup>166</sup> *See* 42 U.S.C. § 2000e-2(m) (2006); 42 U.S.C. § 2000e-5(g)(2)(B) (2006).

<sup>167</sup> *See* 42 U.S.C. § 2000e-2(a)(1) (2006).

<sup>168</sup> *See* 42 U.S.C. §§ 12101–12213 (1990); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

<sup>169</sup> *Lewis v. Humboldt Acquisition Corp., Inc.*, 681 F.3d 312, 322 (6th Cir. 2012) (Clay, J., dissenting) (looking to an ADA House Report, which explicitly stated that

“because of” language of Title VII intact to ensure that “because of” would be defined as requiring a mixed-motive standard.<sup>170</sup> When put in context, then, it is clear that, when Congress enacted the ADA, it meant for the “because of” language to grant a mixed-motive standard.

Moreover, this line of reasoning is in accord with the Court’s analysis in *Nassar*. In *Nassar*, the Supreme Court analyzed the historical context of Title VII in making its determination that the mixed-motive standard of Title VII status-based discrimination claims did not apply to Title VII retaliation claims.<sup>171</sup> But there is a significant difference between the context in which the ADA was enacted and that in which Title VII’s retaliation provision was enacted. Significantly, Title VII’s retaliation provision was enacted prior to the Court’s decision in *Price Waterhouse*.<sup>172</sup> Thus, the Court had not yet held that the phrase “because of” implicated a mixed-motive standard of causation.<sup>173</sup> In contrast, Congress passed the ADA a year after the Court issued its opinion in *Price Waterhouse*.<sup>174</sup> Based on principles of statutory construction, it is presumed that Congress is aware of the governing law when it enacts a new statute.<sup>175</sup> As the Court itself noted in *Nassar*, “[t]ext may not be divorced from context.”<sup>176</sup> Thus, Congress must have been well aware of the *Price Waterhouse* decision when it enacted the ADA and must have known that *Price Waterhouse* construed the “because of” language in Title VII to allow a mixed-motive standard,

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future amendments to Title VII were to apply to the ADA as well); H.R. REP. NO. 102-40, pt. 2, at 4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 697 (“Certain sections of Title VII are explicitly cross-referenced in Subsection 107(a) of the ADA, to ensure that persons with disabilities have the same powers, remedies and procedures as under Title VII. This would include having the same remedies and statute of limitations as Title VII, as amended by this Act, *and by any future amendment.*”) (emphasis added); *see also* Flynn, *supra* note 19, at 2010 n.11 (“Congress links statutes instead of reproducing them, not because it is a paragon of efficiency or paper conservation, but because it wishes to ensure that future legislative changes to the original statute apply to the statute that references—or is linked to—it.”).

<sup>170</sup> See 42 U.S.C. § 2000e-2(a)(1) (2006).

<sup>171</sup> See *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2525 (2013) (“This, then, is the background against which Congress legislated in enacting Title VII . . .”).

<sup>172</sup> See 42 U.S.C. § 2000e-3 (1964); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

<sup>173</sup> See *Price Waterhouse*, 490 U.S. at 239–42.

<sup>174</sup> See 42 U.S.C. §§ 12101–12213 (1990); *Price Waterhouse*, 490 U.S. 228.

<sup>175</sup> *Lewis v. Humboldt Acquisition Corp., Inc.*, 681 F.3d 312, 326 (6th Cir. 2012) (Stranch, J., dissenting); *see also* *Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 813 (1989) (“When Congress codifies a judicially defined concept, it is presumed, absent an express statement to the contrary, that Congress intended to adopt the interpretation placed on that concept by the courts.”).

<sup>176</sup> *Nassar*, 133 S. Ct. at 2530.



subject to a “same decision” affirmative defense. Based on this information, Congress then expressly chose to use the same “because of” language at issue in *Price Waterhouse* when drafting the ADA,<sup>177</sup> and it also added § 12117 to the ADA linking the enforcement provisions of the ADA to Title VII.<sup>178</sup> This ensured that the *Price Waterhouse* definition of “because of” would be controlling with respect to the ADA.<sup>179</sup> Thus, the historical context in which the ADA was enacted is sufficiently distinguishable from that in which Title VII’s retaliation provision was enacted as to demonstrate that a mixed-motive standard applies to the former and not the latter.

*C. Legislative History of the ADA Supporting a Mixed-Motive Standard for the ADA*

As noted above, the plain language of the ADA, including its statutory link to Title VII as well as the historical context in which the ADA was enacted, demonstrates that an ADA plaintiff is entitled to a mixed-motive standard of causation. Even if the language of the ADA is construed as ambiguous, however, the legislative history of the ADA supports the plain language reading posited above.<sup>180</sup>

An ADA House Report stated:

An amendment was offered . . . that would have removed the cross-reference to Title VII and would have substituted the

<sup>177</sup> 42 U.S.C. § 12112(a) (2006).

<sup>178</sup> 42 U.S.C. § 12117 (2006).

<sup>179</sup> See *Lewis*, 681 F.3d at 326–27 (Stranch, J., dissenting) (noting that “when Congress enacted the ADA shortly [after *Price Waterhouse*] and chose both to include the ‘because of’ language and to cross-reference Title VII, it knew that using the Title VII language in an analogous and closely related employment anti-discrimination statute created a ‘motivating factor’ standard”).

<sup>180</sup> Under principles of statutory construction, a court will not consider legislative history when interpreting a statute if the text of the statute is clear on its face. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). Thus, if it were determined that the phrase “because of” is clear, then a court would not look to legislative history to determine what Congress intended the phrase to mean. Moreover, as the above analysis suggests, the plain language at issue supports a mixed-motive standard of causation. But a plausible argument may be made that the language is not actually clear, but rather that it is ambiguous. Support for this argument may be demonstrated by the fact that in *Price Waterhouse*, there were three proposed definitions for the phrase “because of.” *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Moreover, the phrase “because of” has been defined by the courts as describing a but-for causation standard for the ADEA, but at the same time, describing a mixed-motive standard for Title VII. See *supra* Part III.B. Based on these competing definitions of the phrase “because of,” the argument may be raised that the phrase is ambiguous and that more is needed in identifying its significance in the context of the ADA than simply consulting a dictionary. Legislative history may, thus, be helpful in identifying Congressional intent, which may shed light on what Congress intended the phrase to mean in the context of the ADA.

actual words of the cross-referenced sections. This amendment was an attempt to freeze the current Title VII remedies (i.e., equitable relief, including injunctions and back pay) in the ADA. *This amendment was rejected as antithetical to the purpose of the ADA—to provide civil rights protections for persons with disabilities that are parallel to those available to minorities and women.* By retaining the cross-reference to Title VII, the Committee's intent is that the remedies of Title VII, currently and as amended in the future, will be applicable to persons with disabilities.<sup>181</sup>

According to this Report, Congress rejected a proposed amendment that would have removed the statutory link between the ADA and Title VII.<sup>182</sup> Its reason for doing so was that the proposed amendment was contrary to the policies of the ADA—namely that disabled citizens should have “protections” that are “parallel” to Title VII victims.<sup>183</sup> The key word in this Report is “protections.”<sup>184</sup> This word is quite broad and demonstrates Congress's intent for the ADA framework to be analogous to that of Title VII. An ADA plaintiff is not afforded the same “protections” as a Title VII plaintiff when he is required to satisfy but-for causation.

Another ADA House Report speaking about the upcoming 1991 CRA stated that, “[a] bill is currently pending’ that ‘would amend the powers, remedies and procedures of title VII. . . . Because of the cross-reference to title VII in [the ADA], any amendments to title VII that may be made in [that bill] . . . would be fully applicable to the ADA.’”<sup>185</sup> This Report demonstrates that Congress was aware of the pending 1991 CRA legislation when it enacted the ADA. Based on the Report, it is apparent that Congress knew about the amendments that were being made to Title VII and that it fully intended for them to be applicable to the ADA. According to Judge Stranch of the Sixth Circuit, Congress decided to link Title VII to the ADA rather than amend both statutes as a matter of practicality due to timing issues.<sup>186</sup> In linking the statutes, though, Congress “insured that they would

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<sup>181</sup> H.R. REP. NO. 101-485, pt. 3, at 48 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 471 (emphasis added).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Lewis v. Humboldt Acquisition Corp., Inc.*, 681 F.3d 312, 320 (6th Cir. 2012) (quoting H.R. REP. NO. 101-485, pt. 3, at 48 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 471.).

<sup>186</sup> *Id.* at 326 (Stranch, J., dissenting).

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proceed in tandem across time.”<sup>187</sup> Given this history, it is clear that Congress intended for the ADA and Title VII to share the same standards. This would undoubtedly include the mixed-motive standard codified in Title VII.

*D. Legislative History of the 1991 CRA Supporting a Mixed-Motive Standard for the ADA*

The legislative history of the 1991 CRA is even more persuasive on the issue than the legislative history of the ADA.<sup>188</sup> In a House Report for the 1991 CRA (“Report”), the Legislature explicitly stated that “mixed-motive cases involving disability under the ADA should be interpreted consistent with the prohibition against all intentional discrimination in Section 5 of this Act.”<sup>189</sup> The Report then continued by stating in Section 5 that the framework established in *Price Waterhouse* was still too restrictive on plaintiffs and that the *Price Waterhouse* decision should be discarded in favor of a standard that holds employers liable for discrimination that is a “contributing factor” rather than a but-for cause.<sup>190</sup> Thus, this Report explicitly singled out ADA cases involving a mix of legitimate and illegitimate motives, and said that the section in the Report abolishing the *Price Waterhouse* framework in favor of the Title VII mixed-motive standard should apply to the ADA.

The majority in *Lewis* tried to minimize the effects of this Report, but its attempts to do so were contrived at best. First, the court said that Section 5 only applied to Title VII.<sup>191</sup> This conclusion is contrary to the express language in the Report. According to the Report, “mixed-motive cases involving disability under the ADA should be interpreted consistent with the prohibition against all intentional discrimination in Section 5 of this Act.”<sup>192</sup> To say, then, that Section 5 does not apply to the ADA when the ADA is explicitly referenced is simply inaccurate.

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<sup>187</sup> *Id.*

<sup>188</sup> It bears reiterating that the thrust of the argument of this Comment stems from a plain language reading of the ADA. The legislative history described *infra* is merely used to support the above plain language interpretation should the argument be made that the language of the ADA is ambiguous. See *supra* note 180.

<sup>189</sup> H.R. REP. NO. 102-40, pt. 2 at 4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 697.

<sup>190</sup> *Id.* at 18.

<sup>191</sup> *Lewis*, 681 F.3d at 320.

<sup>192</sup> H.R. REP. NO. 102-40, pt. 2 at 4 (1991).

Next, the court stated that the Report referenced the ADA and the ADEA and that since *Gross* did not find the Report persuasive with regard to the ADEA, it should not be persuasive with regard to the ADA either.<sup>193</sup> This bald statement, however, merely concludes that the Report is irrelevant without giving sufficient credit to the fact that the Report carries more weight with regard to the ADA than the ADEA. While the ADEA is mentioned in the Report as the court noted, it is not mentioned in the same context as the ADA.<sup>194</sup> Nowhere in the Report does it say, either explicitly or implicitly, that Section 5 should apply to the ADEA, nor does it even mention a mixed-motive framework with regard to the ADEA. With the ADA, on the other hand, the Report made explicit reference to mixed-motives cases and it linked the ADA to Section 5.<sup>195</sup> Therefore, the ADA and ADEA are not analogous in their legislative history or historical context. While the ADA has been linked to Title VII, which explicitly provides for a mixed-motive standard, and while the ADA has been mentioned explicitly in House Reports indicating the intent for the mixed-motive standard to apply to the ADA, the ADEA lacks the same clear demonstration of intent to apply the mixed-motive standard. For these reasons, the phrase “because of” in the ADA should be considered separately from *Gross*’s definition of the phrase with regard to the ADEA and should be read to require a mixed-motive standard.

#### IV. MIXED-MOTIVE INSTRUCTIONS AS APPLIED TO THE ADAAA

The amendments made to the ADA through the ADA Amendments Act of 2008 (ADAAA) provide even further support that an ADA claimant, suing under the ADA as amended, is entitled to a mixed-motive standard. In 2008, Congress amended the ADA through the ADAAA.<sup>196</sup> These amendments were intended “to restore the intention and protections of the Americans with Disabilities Act of 1990, providing a clear and comprehensive national mandate for the elimination of discrimination on the basis of disability.”<sup>197</sup> For purposes of this Comment, the most relevant amendment is the one that was made to the ADA’s causal language. Before the ADAAA

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<sup>193</sup> *Lewis*, 681 F.3d at 321.

<sup>194</sup> See H.R. REP. NO. 102-40, pt. 2 at 4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 697.

<sup>195</sup> *Id.*

<sup>196</sup> ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended at 42 U.S.C. §§ 12101–12213 (2009)).

<sup>197</sup> H.R. REP. NO. 110-730, pt. 1, at 4.

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took effect, the ADA stated that a disabled individual could not be discriminated against “because of” his disability.<sup>198</sup> Then, the ADAAA amended this language so that it now states that a disabled individual cannot be discriminated against “on the basis of” his disability.<sup>199</sup> Since this amendment is not effective retroactively, recent cases involving a question of the appropriate standard of causation in ADA cases have not had the opportunity to analyze the new language.<sup>200</sup> But considering the emphasis that court decisions have placed on the phrase “because of” in these types of cases, the change in language to “on the basis of” may significantly alter a court’s analysis.<sup>201</sup>

For example, one obvious impact of this change in language is that it significantly limits the reliance that can be placed on *Gross* (and *Nassar*, which relied on the Court’s holding in *Gross* to determine the meaning of the phrase “because of” in the Title VII retaliation context).<sup>202</sup> The “because of” language was crucial to the Court’s holding in *Gross*. After consulting a dictionary, the Court concluded that the plain meaning of the phrase “because of” required but-for causation.<sup>203</sup> But since the ADAAA replaced this language, the plain language consideration in *Gross* involving the definition of “because of” is no longer applicable to the analysis set forth here.

Moreover, the plain language of the phrase “on the basis of” is significantly broader than the phrase “because of.” Contrary to the assertion in *Gross* that “because of” means the same thing as “on the basis of,”<sup>204</sup> at least with regard to the ADAAA, this conclusion cannot

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<sup>198</sup> 42 U.S.C. § 12112 (2006).

<sup>199</sup> 42 U.S.C. § 12112 (2009).

<sup>200</sup> *See, e.g., Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 961 n.1 (7th Cir. 2010).

<sup>201</sup> As a preliminary matter, it should be noted that this new language does not render the previous discussion in this Comment moot. As noted above, the ADAAA does not apply retroactively, so there are still cases currently being decided under the original wording of the ADA. *See, e.g., Lewis v. Humboldt Acquisition Corp., Inc.*, 681 F.3d 312 (6th Cir. 2012). Moreover, a court may decide that the new causal language of the ADAAA does not affect the analysis, in which case the arguments made in Part III *supra* are still highly relevant. Furthermore, since the ADAAA merely amends the original ADA and, thus, stems from the same historical context, it must be viewed in the same light discussed in Part III *supra*. The history regarding court interpretations of the original “because of” language is needed in order to understand the significance of this new change in language.

<sup>202</sup> *See, e.g., Siring v. Oregon State Bd. of Higher Educ.*, No. 3:11-cv-01407, 2013 WL 5636718 (D. Or. Oct. 15, 2013) (holding that a mixed-motive standard of causation applies to the ADAAA notwithstanding the Supreme Court’s decision in *Nassar*).

<sup>203</sup> *Gross v. FBL Fin. Serv., Inc.*, 557 U.S. 167, 176 (2009).

<sup>204</sup> *Id.* at 176 (citing *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 63–64, 63 n.14 (2007)).

logically apply. The very fact that Congress amended the language from “because of” to “on the basis of” implies that Congress intended for these two phrases to mean different things with respect to the ADAAA. If Congress intended for “because of” and “on the basis of” to have exactly the same meaning with regard to disability discrimination, then it would not have amended the language.

Some dictionary definitions of the word “basis” include “a relation that provides the foundation for something,” “the most important or necessary part of something,” “that which supports,” and “the principal component part of a thing.”<sup>205</sup> Each of these definitions implies that the “basis” is just one piece out of many that make something up.<sup>206</sup> As applied to the ADAAA then, an employment decision is made “on the basis of” disability when disability is simply one factor that makes up the employment decision.<sup>207</sup>

The legislative history of the ADAAA provides even further support for the argument that the change in language to “on the basis of” was intended to ensure that ADAAA plaintiffs get the same mixed-motive standard as Title VII plaintiffs. According to an ADAAA House Report, the ADAAA changed the causational language from “because of” to “on the basis of” in order to “[align] the construction of the Americans with Disabilities Act with Title VII of the Civil Rights Act of 1964 . . . .”<sup>208</sup> The House Report also states that “[t]he bill amends Section 102 of the ADA to mirror the structure of nondiscrimination protection in Title VII of the Civil Rights Act of 1964, changing the language of Section 102(a) from prohibiting discrimination against a qualified individual ‘with a disability because of the disability of such individual’ to prohibiting discrimination against a qualified individual ‘on the basis of disability.’”<sup>209</sup> This Report explicitly states that Congress changed the causational language of the ADA in order to mirror Title VII.<sup>210</sup> This demonstrates a clear intent by Congress to grant the same causational standard under Title VII to plaintiffs who bring an action under the ADAAA.

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<sup>205</sup> William D. Goren, *Americans with Disabilities Act Claims: Is a Mixed Motive Jury Instruction Dead?*, 24 DCBA 28, 32 (2012) (citing Webster’s Online Dictionary, <http://www.websters-online-dictionary.org/definition/basis>) (last visited Apr. 16, 2013).

<sup>206</sup> *Id.* at 31.

<sup>207</sup> *Id.*

<sup>208</sup> H.R. REP. NO. 110-730, pt. 1, at 6.

<sup>209</sup> *Id.* (emphasis added).

<sup>210</sup> *Id.*

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Furthermore, Congress was aware that many circuits were applying a “motivating factor” standard in ADA cases when it passed the ADAAA.<sup>211</sup> If it so wished, Congress could have overruled these cases by explicitly including a new provision in the ADAAA making it clear that a mixed-motive standard is not the appropriate standard of causation for ADA cases. But Congress did not enact such a provision. Rather, Congress remained silent on the issue. This demonstrates an intent by Congress to ratify those holdings and to confirm that ADA plaintiffs are entitled to a mixed-motive standard. Thus, between the actual causational language of the ADAAA (“on the basis of”), its legislative history, and the historical context in which the ADAAA was adopted, it is quite clear that a plaintiff suing under the ADAAA does not have to prove but-for causation. Rather, the employee must prove only that his disability played a role in his employer’s adverse employment decision.

#### V. CONCLUSION

Jurisprudence in employment discrimination since *Gross* has made it difficult, if not nearly impossible, for victims of discrimination to recover for the senseless losses they have suffered. The unreasonably high standard of but-for causation cuts against the very underpinnings of employment discrimination laws, which reflect the understanding that discrimination serves no purpose in a civilized society, and should be eradicated. In the context of the ADA specifically, a but-for causation standard is unduly harsh in light of the overwhelmingly copious evidence of legislative intent, which demonstrates Congress’s belief that ADA plaintiffs should only have to satisfy a mixed-motive standard. Look back to the hypothetical posited in the beginning of this Comment. It would be unduly burdensome to require the handicapped employee to jump extra hurdles in order to prevail on a claim of disability discrimination when it is uncontested that the employer was discriminating against her. Allowing an employer to escape liability in such a situation by requiring the employee to prove but-for causation undermines the policies behind the ADA and the ADAAA. Simply put, the analysis in *Gross* has no place

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<sup>211</sup> From the time that the mixed-motive standard was laid out in the 1991 CRA, many circuits have held that a “motivating factor” standard is the appropriate causational level with which to decide ADA cases rather than a straight forward but-for causation analysis. See, e.g., *Head v. Glacier Nw. Inc.*, 413 F.3d 1053 (9th Cir. 2005); *Parker v. Columbia Pictures Indus.*, 204 F.3d 326 (2d Cir. 2000); *Foster v. Arthur Andersen, LLP*, 168 F.3d 1029 (7th Cir. 1999); *Newberry v. E. Texas State Univ.*, 161 F.3d 276 (5th Cir. 1998); *Katz v. City Metal Co., Inc.*, 87 F.3d 26 (1st Cir. 1996); *Pedigo v. P.A.M. Transp., Inc.*, 60 F.3d 1300 (8th Cir. 1995).

in an ADA or ADAAA inquiry, and the opinions that have applied that analysis to such cases have clearly missed the mark. For the foregoing reasons, the mixed-motive standard is the appropriate standard of causation to apply to ADA and ADAAA cases.